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March 10, 2014

State Elections Enforcement Commission
Attn: Legal Unit – Compliance
20 Trinity Street – Fifth Floor
Hartford, CT 06106

Re: Comments on Proposed Declaratory Ruling 2014-1 and 2014-2

To Whom It May Concern:

We write to comment on Proposed Declaratory Ruling 2014-1 and 2014-2, which were issued in response to our request dated October 9, 2013 and our supplemental request dated November 1, 2013.

I. Proposed Declaratory Ruling 2014-1

The Proposed Ruling concludes that the "plain meaning of the term 'obligate' as it is used in this context would encompass taking those actions after which a person has incurred a duty to pay for goods or services relating to an independent expenditure." Prop. Dec. Ruling 2014-1 at 4. We agree with part of this conclusion: a person does not "obligate" to make an independent expenditure until there is a legal "duty to pay for" the expenditure.

But this conclusion is inconsistent with the statute in one important respect: the reporting obligation is triggered when the person has incurred a legal duty to make the *expenditure itself*, not when the person has merely obligated to pay for goods or services *relating to a potential expenditure*. *See* Conn. Gen. Stat. § 9-601d(a) (imposing a reporting obligation on any person that "makes or obligates to make independent expenditure or expenditures in excess of one thousand dollars"). The effect of reading "relating to" into the statute is to require disclosure of independent expenditures weeks, if not months, in advance of the date on which the expenditure itself is made or obligated to be made. As we describe below, mandating that entities report expenditures this far in advance is contrary to the statute, impracticable, and unconstitutional. The Final Ruling ought to remove the words "relating to" from the sentence cited above and adjust its analysis accordingly.

First, the "relating to" language that the Proposed Ruling interposes is nowhere to be found in the statutes. The relevant statutory language reads:

> ***Any person who makes or obligates to make an independent expenditure or expenditures*** in an election or primary for the office of Governor, Lieutenant Governor, Secretary of the State, State Treasurer, State Comptroller, Attorney General, state senator or state representative, which exceed one thousand dollars, in the aggregate, during a primary campaign or a general election campaign, as defined in section 9-700, shall file, electronically, a long-form and a short-form report ***of such independent expenditure or expenditures*** with the State Elections Enforcement Commission pursuant to subsections (c) and (d) of this section. ***The person that makes or obligates to make such independent expenditure or expenditures shall file such reports not later than twenty-four hours after (1) making any such payment, or (2) obligating to make any such payment***, with respect to the primary or election.

Id. (emphasis added). The plain language of the statute is unambiguous: the reporting obligation is triggered only when a person "makes or obligates to make [the] *independent expenditure or expenditure*." *Id.* (emphasis added). Had the legislature intended for the reporting obligation to be triggered by the making, or obligating to be made, of any payments "relating to" an independent expenditure or expenditure, it could have said so explicitly. Because there is "but one reasonable or plausible meaning of the statutory language," the Commission must "stop there" and may not "consult other sources" to adduce the meaning of the statute. *Genesky v. Town of East Lyme*, 275 Conn. 246, 277 (Conn. 2005).

Second, the "relating to" standard is unworkable in practice. The Proposed Ruling states that a person that has reserved airtime for television advertisements and has developed at least one advertisement that qualifies as an independent expenditure (even if it has also developed advertisements that do not qualify as independent expenditures) has triggered an obligation to file a disclosure report within 24 hours of reserving the airtime. Such a report would be required to include the following information:

- The name of the person making or obligating to make such independent expenditure;
- The amount of the independent expenditure;
- Whether the independent expenditure was in support of or in opposition to a candidate and the name of such candidate;
- A brief description of the expenditure made, including the type of communication, based on categories determined by the State Elections Enforcement Commission, and the

allocation of such expenditure in support of or in opposition to each candidate, if such expenditure was made in support of or in opposition to more than one candidate; *and*

- The name, telephone number and electronic mail address for the individual filing such report.

Conn. Gen. Stat. § 9-601d(d).

There is no practical way for a person to comply with these requirements within 24 hours of reserving airtime. To start, the entity cannot reasonably be expected to know the "amount" of the future expenditure. When an entity reserves airtime, it does not mean that the entity will use that airtime. *See* Shira Toeplitz, Roll Call, "NRSC Places $25 Million Ad Reservation for Fall Campaign" (April 11, 2012) ("To be clear, the NRSC's buy is just a reservation, and operatives can change the amount and move funds to different states before the ads hit the airwaves this fall"), *available at* http://atr.rollcall.com/nrsc-places-25-million-ad-reservation-for-fall-campaign/. Plans change frequently based on the electoral and legislative developments; the entity might increase the amount it spends on advertisements in Connecticut or it may decrease that amount. Any "amount" disclosed on the report at the time of the reservation would be a stab in the dark, not a useful piece of data for the public to evaluate.

Even if the entity knew how much money it was spending on advertisements in Connecticut, however, it would not know (a) what share of the budget might be dedicated to "independent expenditures" and what share might be dedicated to other types of advertisements, such as grassroots lobbying advertisements, (b) which candidates would be supported or opposed in the independent expenditure advertisements, or (c) the allocation of spending among these candidates. It is common for an entity to develop several advertisements ahead of time and subsequently discard some or all of them based on changed circumstances. The information that is required to be disclosed about each independent expenditure will not generally be known to the entity until it finalizes the advertisement and ships it to the television station (*e.g.* when it "obligates to make" the expenditure).

The unworkability of the "relating to" standard manifests itself throughout the Proposed Ruling. On the one hand, the Proposed Ruling states that reimbursements to a media vendor for stock footage that could be used in independent expenditures would not trigger a filing. On the other hand, the Proposed Ruling concludes the answer changes when the stock footage features a clearly identifiable candidate, notwithstanding the fact that an entity could air advertisements featuring clearly identifiable candidates without making an "independent expenditure." *See* Conn. Gen. Stat. § 9-601b(7) (exempting from the definition of "expenditure" certain types of issue communications). Even more troubling is the assertion that criticism of a candidate's education policy is, *ipso facto*, an "expenditure" that subjects the spender to a reporting obligation irrespective of whether the speech contains any electoral content or is instead directed

at influencing legislation. As written, the Proposed Ruling does not provide any clear yardstick by which an entity can judge whether it has made or obligated to make an independent expenditure.

Third, even if it were practical to require an entity to file disclosure reports weeks, or even months, before it obligated to make an independent expenditure, it would not be constitutionally permissible to do so. As the Proposed Ruling acknowledges, government-compelled disclosure is permissible under the First Amendment only to "enable[] the electorate to make informed decisions and give proper weight to different speakers and messages." *Citizens United v. FEC*, 558 U.S. 310, 371 (2010). Under Connecticut's statute, the public and media have access to these filings no later than 24 hours after they are obligated to be made. Because television advertisements are usually shipped to stations at least one day before they air – and, at that point, they are obligated to be made – this means that full disclosure will be achieved no later than the day the advertisement airs. The Proposed Ruling offers no explanation why same-day disclosure is insufficient to satisfy the public's right to be informed.[1]

On the other hand, mandating disclosure weeks, or even months, ahead of time would effectively compel an entity to disclose its confidential plans to its political adversaries. Assuming this information was even known to the entity at the time – and, as noted above, it almost certainly would not be – the entity's adversaries would be made aware of the most intimate details of the entity's election plans: the candidates it planned to support or oppose; the means by which they planned to support or oppose them; and the specific amounts that they planned to spend. Requiring entities to disclose actual expenditures within 24 hours is already at the edge of constitutional permissibility. *See Citizens for Responsible Gov't State Political Action Committee v. Davidson*, 236 F. 3d 1174, 1197 (10th Cir. 2000) (striking down as unconstitutional a state law requirement mandating disclosure within 24 hours after obligating funds for an independent expenditure); *Nat'l Org. for Marriage v. McKee*, 723 F.Supp.2d 245, 266 (D. Me. 2010) (striking down as unconstitutional a twenty-four hour disclosure requirement, except during two weeks prior to election).[2] Compelling them to disclose their expenditures well in advance of publication does not pass constitutional muster. As a federal court indicated in striking down a similar requirement in Florida, "the Court has been unable to locate any case upholding a disclosure requirement prior to publication." *Florida Right to Life, Inc. v. Mortham*, 1998 WL 1735137, *8-9 (M.D. Fla.) (Sept. 30, 1998). *See also Citizens for Responsible Gov't*

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[1] In the case of reserved airtime, it is particularly unnecessary. Stations are required to "keep and permit public inspection of a complete and orderly record (political file) of all requests for broadcast time made on or behalf of a candidate for public office, together with an appropriate notation showing the disposition made by the licensee of such requests, and the charges made, if any, if the request is granted." 47 C.F.R. § 1943(a). *See also* §76.1701(a) (applying same requirement to cable television stations). This information is required to be made available online and can be found here: https://stations.fcc.gov/.

[2] The state did not challenge this holding on appeal. *See Nat'l Org. for Marriage v. McKee*, 649 F.3d 34, 45-46 (1st Cir. 2011).

State Political Action Committee, 236 F.3d at 1198 (striking down as unconstitutional a requirement that entities making independent expenditures provide immediate written notice to each candidate in the race).

We urge the Commission to revise the Proposed Ruling to make clear that disclosure is triggered when an entity pays for an independent expenditure or incurs a legal obligation to do so. That approach comports with the statute and can be implemented by the regulated community. It is consistent with the rule followed by the Federal Election Commission ("FEC") and other states. *See, e.g.* Bipartisan Campaign Reform Act of 2002 Reporting, 68 Fed. Reg. 404, 407 (Jan. 3, 2003) ("Please note that under these rules, independent expenditures must be reported by political committees after a disbursement is made, or a debt reportable under 11 CFR 104.11(b) is incurred, for an independent expenditure, but no later than 11:59 p.m. on the day following the date on which the independent expenditure is first publicly distributed or otherwise publicly disseminated."); 1 Tex. Admin. Code § 20.57(a) ("[t]he date of a political expenditure is the date the amount is readily determinable by the person making the expenditure."). It will result in prompt disclosure of expenditures, so that the public can give proper weight to different speakers and messages and make informed voting choices, without compelling entities to disclose strategic information to their adversaries well in advance of the expenditures being made.[3]

II. Proposed Declaratory Ruling 2014-2

We agree with the central conclusion in Proposed Declaratory Ruling 2014-2 that "a candidate's non-earmarked fundraising for an entity that makes 'covered transfers' is not *presumed* to establish coordination between the candidate and the entity receiving such covered transfers." Prop. Dec. Ruling 2014-2 at 4 (emphasis in original). The Proposed Ruling correctly notes that such fundraising is not listed among the enumerated factual patterns that creates a rebuttable presumption of coordination and, accordingly, would not "alone … prove coordination – nor would it even create the presumption that there was coordination." *Id.* at 5. We appreciate the Commission providing clarity on this issue.

The Proposed Ruling also says that such fundraising "might constitute evidence" of coordination, if other factors are present. The Proposed Ruling sets forth a hypothetical scenario in which a candidate raises non-earmarked funds for an entity at one point in time, and later approaches the entity with the proposal that it take a portion of the funds raised and direct the funds to another entity who has told the candidate that it would like to make expenditures to

[3] The Proposed Ruling suggests that following this approach could result in an entity "negotiat[ing] a contract with a media consultant containing a term that it may … refuse to pay for [an advertisement] if polling does not demonstrate that it reached a certain number of people." Prop. Dec. Ruling 2014-1. The idea that a media consultant would pay television stations hundreds of thousands, or millions, or dollars without the guarantee of being paid is utterly unrealistic. No media consultant would ever do such a thing. And if it did, it would still be reportable as an in-kind contribution by the media consultant and an expenditure by the entity.

benefit the candidate. As the Proposed Ruling acknowledges in footnote 4, however, this scenario goes well beyond the *non-earmarked* fundraising that we ask about in our request and instead amounts to *earmarked* fundraising for an entity making independent expenditures. The Final Ruling ought to clarify that it is the subsequent request for earmarked funds, not the initial solicitation of non-earmarked funds, that "might constitute evidence" of coordination in this scenario.

The Proposed Ruling then speculates that "if the entity in the petitioner's question – the one receiving non-earmarked contributions – had previously made covered transfers to a maker of independent expenditures (who had made them on behalf of the candidate), then the candidate's fundraising activities vis-à-vis the entity also might constitute evidence of coordination." *Id.* at 5. Again, we think that further clarification is needed here. Notwithstanding the assertion on page 6 that "[t]he Commission reserves its ability to consider all facts that might be relevant to … [a] determination on whether an expenditure was independent or coordination," *id.* at 6, the legislature has imposed some limits on the Commission's discretion in this area. Section 9-601c(c)(3) provides that "[w]hen the [Commission] evaluates an expenditure to determine whether [it] is an independent expenditure, *the following shall not be presumed to constitute evidence of consent*, coordination or consultation … financial support for, or solicitation or fundraising on behalf of the entity by a candidate or an agent of the candidate, *unless the entity has made or obligated to make independent expenditures* in support of such candidate in the election or primary for which the candidate is a candidate." Conn. Gen. Stat. § 9-601c(c)(3) (emphasis added). In the scenario proffered in our request, a candidate has solicited non-earmarked funds for an entity that makes covered transfers but has *not* itself "made or obligated to make independent expenditures." Accordingly, the plain language of section 9-601c(c)(3) explicitly bars the Commission from presuming that this fundraising activity constitutes evidence of coordination. The Final Ruling should explicitly acknowledge this.

Finally, while we agree that looking to sources of law outside of Connecticut is useful, we disagree that the court cases or advisory opinions cited in the Proposed Ruling support the proposition that non-earmarked fundraising might constitute evidence of coordination.

- The quotation from the Supreme Court's decision in *McConnell v. FEC*, 540 U.S. 93 (2003) does not pertain to coordination at all. It instead addresses a provision in the McCain-Feingold law that bars federal officeholders and candidates from raising certain types of funds in connection with *any* election (federal or nonfederal). Connecticut law does not contain any similar provision, making *McConnell* largely inapposite. And, in fact, the FEC unanimously interpreted the McCain-Feingold law to *allow* candidates to solicit certain types of funds for independent expenditure-only committees, without tainting the independence of future communications. *See* FEC Adv. Op. 2011-12.

- The Proposed Ruling also cites to *FEC v. Colorado Republican*, 533 U.S. 431 (2001) (known as *"Colorado II"*). But in *Colorado I*, the predecessor case, the Supreme Court found that the FEC's prohibition on political parties making independent expenditures was unconstitutional, even though political parties rely heavily on candidates to solicit money on their behalf. *See FEC v. Colorado Republican*, 518 U.S. 604 (1996) (*"Colorado I"*).

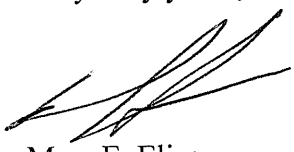
- The recent decision by Minnesota's Campaign Finance and Public Disclosure Board dealt with candidate fundraising for the entity making independent expenditures; it did not address a candidate's solicitation of non-earmarked funds for an entity that makes donations to independent expenditure committees. *See* Board Adv. Op. 437 (Feb. 11, 2014). Echoing *Colorado I,* the Board opinion also clarified that a candidate's fundraising for a political party did not destroy the party's ability to make independent expenditures on the candidate's behalf, suggesting that non-earmarked fundraising does not raise the same legal concerns as earmarked fundraising for an independent expenditure committee.

- The opinion from the Kentucky Registry of Election Finance ("KREF"), too, does not address non-earmarked fundraising. In that opinion, the KREF held that a caucus committee may provide unlimited funds to an "unauthorized committee" (Kentucky's nomenclature for an independent expenditure-only committee) but warned that a candidate should not be involved in requesting the funds. *See* KREF AO 2012-05 (Aug. 17, 2012). Significantly, however, the KREF did not suggest that a candidate's fundraising for the *caucus committee* might taint the independence of the unauthorized committee's expenditures, merely because the caucus committee had made contributions to the unauthorized committee.

We request that the Proposed Ruling be amended to clarify (a) the scenario on page 5 "might constitute evidence" of coordination because of the candidate's subsequent request for earmarked funds, not her initial solicitation of non-earmarked funds and (b) that the Commission is barred by statute from "presuming" that a candidate's non-earmarked fundraising for an entity that makes covered transfers is "evidence of coordination," even if the entity receiving covered transfers has made independent expenditures on the candidate's behalf.

Thank you for your consideration and please do not hesitate to get in touch should you have additional questions.

Very truly yours,



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